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In The

Supreme Court of the United States

October Term, 1997

EXXEL/ATMOS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, and
UNITED STEELWORKERS OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an employer violate the National Labor Relations Act, 29 U.S.C. § 158(a)(1)(5), when it suspends bargaining or withdraws recognition from an incumbent union, where its employees have filed a petition for decertification and the National Labor Relations Board (NLRB) has refused to disclose to the Employer whether the petition is supported by a majority of its employees?

2. Does a respondent in an NLRB proceeding waive appellate review by failing to request reconsideration or rehearing regarding the appropriateness of an order to bargain issued by the NLRB?

STATEMENT PURSUANT TO RULE 29.6

All parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit are listed in the caption of this case, and no other parties appeared in the proceedings below. Petitioner, Exxel/Atmos, Inc., has no parent company or non-wholly-owned subsidiaries, and is not publicly traded.

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OPINIONS BELOW

A. The Circuit Court of Appeals for the District of Columbia Circuit.

(1) The decision of the D.C. Circuit was filed on June 26, 1998 and is reported as *Exxel/Atmos, Inc. v. NLRB* (*Exxel II*), 147 F.3d 972, 158 L.R.R.M. (BNA) 2699, 135 Lab. Cas. P.10,190 (D.C.Cir. 1998) (No. 97-1417). (1a-17a) It is this decision which is the subject of this petition.

(2) *Related Decision: Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243 (D.C. Cir. 1994). (25a-38a)

B. The Decision of the National Labor Relations Board (NLRB)

The decision of the NLRB, which was the subject of review in the above case, is reported as *Exxel/Atmos, Inc.* (*Exxel II*), 323 NLRB No. 158, 155 L.R.R.M. (BNA) 1146, 1997-1998 NLRB Dec. P.16, 281 (June 5, 1997) (No. 22-CA-20475). (39a-52a)

Related Decisions:

1. *Exxel/Atmos, Inc.*, 323 NLRB No. 159, 155 L.R.R.M. (BNA) 1148 (N.L.R.B., June 5, 1997) (No. 22-CA-17889) (53a-58a).

2. *Exxel/Atmos, Inc.* (*Exxel I*), 309 NLRB 1024, 309 NLRB No. 165, 143 L.R.R.M. (BNA) 1042, 1992-93 NLRB Dec. P 17,677 (*Exxel I*) (N.L.R.B., Dec. 16, 1992) (No. 22-CA-17889) (59a-100a).

STATEMENT OF JURISDICTION

On June 26, 1998 the United States Court of Appeals for the District of Columbia Circuit issued a Decision enforcing in part an order of the NLRB requiring Exxel/Atmos, Inc. (Exxel) to bargain with United Steelworkers of America, AFL-CIO/CLC (Steelworkers or Union), as the representative of its employees despite the fact that such employees had filed a petition for decertification and the NLRB had refused, upon request, to advise Exxel whether such petition was

supported by a majority of its employees. The Court of Appeals further held that Exxel had waived objection to the Board's bargaining order by failing to ask for reconsideration or rehearing by the NLRB before addressing the issue of the appropriateness of the Order in its appeal to the circuit court.

At the time of filing a judgment had been proposed by the NLRB but not entered. (105a-111a). Petitions for Rehearing and Suggestion for Rehearing En Banc were denied on August 26, 1998. (101a-104a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 AND 29 U.S.C. § 178(c).

STATUTORY PROVISIONS

The provisions of the National Labor Relations Act of 1947, as amended which are involved herein are:

Section 157; 29 U.S.C. §157

Right of employees as to organization, collective bargaining, etc.

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Section 158(a)(1) and (5); 29 U.S.C. §158(a)(1) and (5)

(a) Unfair labor practices for an employer

"It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

Section 160(e); 29 U.S.C. § 160(e)

(e) Petition to court for enforcement of order; proceedings; review of judgment

"The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part

the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. . . ."

Section 160(f); 29 U.S.C. § 160 (f)

(f) Review of final order of Board on petition to court

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on

the record considered as a whole shall in like manner be conclusive."

STATEMENT OF THE CASE

A. The Proceedings Below

In *Exxel/Atmos, Inc.* (*Exxel I*), 309 NLRB 1024 (1992), the NLRB found that Exxel had violated § 8(a)(5) of the National Labor Relations Act (NLRA or the Act) by refusing to bargain with and withdrawing recognition from the Steelworkers after learning of a petition being circulated by its employees indicating that they did not wish to be represented by that labor organization. The remedy imposed by the NLRB required Exxel to cease and desist from refusing to meet and to bargain collectively with the Steelworkers. It also affirmatively required Exxel to recognize and bargain with the Steelworkers, thus imposing a bargaining order upon the Employer which would preclude a petition for decertification by its employees for a period of one year.

The Board's decision was reviewed by the United States Court of Appeals for the District of Columbia in *Exxel/Atmos, Inc. v. National Labor Relations Board* (*Exxel I*), 28 F.3d 1243 (D.C. Cir. 1994), *petition for rehearing en banc denied* 37 F.3d 1538 (D.C. Cir. 1994). In that decision the District of Columbia Circuit enforced those portions of the Board order which found a violation of Sections 8(a)(1) and (5) of the Act and ordered Exxel to cease and desist from refusing to recognize and bargain with the Steelworkers. (A cease and desist order precludes a petition for decertification for a reasonable period, but not necessarily one year). The court remanded the affirmative remedial aspect of the NLRB's bargaining order to the NLRB for an explanation of its necessity under the circumstances of this case.

While the remand was pending, the NLRB issued a second decision involving events which took place subsequent to the remand. In that decision, *Exxel/Atmos, Inc. and United Steelworkers of America, AFL-CIO* (*Exxel II*), 323 NLRB No. 158 (1997), the NLRB found that the employer had violated the Act by unilaterally granting its employees a Christmas bonus, by giving a speech to employees in

which it "instigated" the filing of a decertification petition, and by refusing to bargain with the Union in violation of Sections 8(a)(5) and (1) of the Act. It again issued both a cease and desist and affirmative bargaining order, requiring Exxel to recognize and bargain with the Steelworkers. At the same time, the Board issued a supplemental decision in response to the Circuit's remand in *Exxel I*, in which it offered no explanation for its imposition of a bargaining order, as requested by the circuit court, but simply referred the court to its general explanation in *Caterair International*, 322 NLRB No. 11 (1996), enforced in part and remanded in *Caterair International v. National Labor Relations Board*, 22 F.3d 1114 (D.C.Cir. 1994), an approach which the District of Columbia Circuit earlier had specifically rejected in *Lee Lumber & Building Materials Corp. v. NLRB*, 117 F.3d 1954 (D.C. Cir. 1997). (53a-58a)

Exxel sought review of both the NLRB's decision in *Exxel/Atmos, Inc.* (*Exxel II*), 323 NLRB No. 158 (1997) (No. 97-1417) and the NLRB's supplemental decision in *Exxel/Atmos, Inc.* (*Exxel I*), 323 NLRB No. 159 (1997) (No. 97-1418). The NLRB filed cross-petitions for enforcement in both cases. The petitions in Nos. 97-1417 and 97-1418 were consolidated for decision by the District of Columbia Circuit. The court assumed jurisdiction pursuant to 29 U.S.C. § 160(e) and (f).

Certiorari is sought with regard to the decision of the District of Columbia Circuit in *Exxel/Atmos, Inc. v. NLRB* (*Exxel II*), 147 F.3d 993 (D.C. Cir. 1998). In that decision, the Circuit found that a speech given by Exxel's President and the granting of a $100 bonus at Christmas time, found by the NLRB to be independent violations of Section 8(a)(1) of the Act, did not violate the Act. Therefore, the court denied enforcement of that portion of the NLRB's Order which related to these alleged violations. Nevertheless, it enforced the NLRB's affirmative bargaining order, requiring the Employer to bargain with the Union for a period of one year before either the Employer or its employees could petition the NLRB for an election. In doing so, the court acknowledged that under some circumstances an employer may suspend bargaining if it "can show by 'clear, cogent and convincing' evidence either that the union has lost majority support or that the employer has a reasonable good faith doubt of continuing

majority support". (12a) *Citing Micro-image Display Division of Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991). It also recognized that Exxel had twice requested by letter that the NLRB inform it whether a majority of Exxel's employees had petitioned for decertification, and that the NLRB had refused each request. (13a) Nevertheless, the court held that this fact did not excuse Exxel from complying with its initial cease and desist Order. (13a) In so doing, the circuit court cited but failed to adopt the rule of the Third Circuit in *NLRB v. New Associates*, 35 F.3d 828 (3d Cir. 1994). (13a) In *New Associates*, the Third Circuit held that it would deny enforcement of a bargaining order in cases where the NLRB has refused to provide the Employer, upon request, with information as to the majority support of its employees for a petition for decertification, unless there is other evidence that the employer is aware of the insubstantiality of the decertification petition. Thus, there is a direct conflict between the District of Columbia Circuit and the Third Circuit within the meaning of Rule 10(a) as to this important issue of labor law and the application of the NLRA.

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The Circuit then went on to enforce the NLRB's affirmative bargaining order, holding that Exxel had never contested the propriety of the affirmative bargaining order in the proceedings before the Board. (13a-14a) Thus, the court held that under Section 10(e) of the Act it lacked jurisdiction because Exxel had waived any right it had to object to the Order before the circuit court. 29 U.S.C. § 160(e). In support of that conclusion the circuit cited this court's decision in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) and its own decision in *Quazite v. NLRB*, 87 F.3d 439, 497-98 (D.C. Cir. 1996).[1] (13a-14a)

B. Factual Background

On September 7, 1990, over eight years ago, Exxel, without the vote of its employees, voluntarily recognized the Steelworkers as the collective bargaining representative of its production and maintenance employees, quality control employees, laboratory technicians and

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1. In view of this disposition, the court denied the petition for review and cross-petition for enforcement in No. 97-1418.

senior technicians. (66a) After the commencement of bargaining, Exxel learned of employee disaffection with the Union. Consequently, in August, 1991 Exxel withdrew recognition and "informed the NLRB that it no longer believed that the Union represented a majority of workers in the bargaining unit and requested a NLRB-sponsored election". *Exxel/Atmos, Inc. v. NLRB* (*Exxel I*), *supra*, 28 F.3d at 1245. (29a) The Union then filed unfair labor practice charges against Exxel alleging an unlawful and premature withdrawal of recognition. On July 23, 1992, following a hearing, an Administrative Law Judge issued a decision finding that Exxel had violated §§ 8(a)(1) and 8(a)(5) of the Act by withdrawing recognition from the Union.[2] (29a) On December 16, 1992 the NLRB adopted the conclusions of the Administrative Law Judge and entered an order requiring that Exxel cease and desist from engaging in conduct found to be in violation of the Act. The NLRB also issued a bargaining order affirmatively requiring Exxel to bargain with the Union. *Exxel/Atmos, Inc.* (*Exxel I*), 309 NLRB 1024 (1992). (59a)

On respondent's petition for review and the NLRB's cross-petition for enforcement, the District of Columbia Circuit affirmed the NLRB's finding that Exxel had violated §§ 8(a)(1) and 8(a)(5) of the Act. *Exxel I*, 28 F.30d at 1247. (25a-38a) While upholding the NLRB's issuance of a cease and desist order, the Court nevertheless refused to enforce the NLRB's bargaining order because the NLRB had failed to explain why it needed such an extraordinary remedy. *Exxel I*, 28 F.3d at 1249. (34a-38a) In doing so, the court went to considerable length to explain that a bargaining order is particularly inappropriate without an explanation based upon a case-to-case factual analysis because unlike a cease and desist order, a bargaining order will bar a petition for decertification or other challenges to the union's representational status for a reasonable period, normally a year. *Exxel*, 28 F.3d 1248-49. (34a-35a) Therefore, the court remanded the case to the NLRB with direction that it explain the need for a bargaining order. *Id.* at 1249. (38a) On August 17, 1994, the NLRB petitioned for a rehearing *en banc*, arguing for a remedial bargaining order

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2. The RM petition, 22-RM-679, filed on August 7, 1991, was never processed by Region 22 due to the unfair labor practice charges filed by the Union and the Board's so-called blocking charge policy. (68a)

because under the cease and desist order Exxel's employees could seek to decertify the Union at any time. The District of Columbia Circuit denied the petition on November 4, 1994. (19a-24a)

On June 5, 1997, *almost three years after the remand*, the NLRB issued the Supplemental Decision which was the subject of the petition and cross-petition in Case No. 97-1418. *Exxel/Atmos, Inc.* (*Exxel I*), 323 NLRB No. 159 (1997). (53a-58a) In that decision, the NLRB defiantly failed or refused to provide the explanation called for on remand. Rather, it simply referred the court to its decision in *Caterair International*, 322 NLRB No. 11 (1996), an approach which the District of Columbia Circuit subsequently rejected and characterized as "disingenuous" in *Lee Lumber & Building Materials Corp. v. National Labor Relations Board*, 117 F.3d 1454 (D.C. Cir. 1997).

After the mandate was issued and pursuant to the court's Order, Exxel posted the required Board Notice and contacted the Union to resume bargaining. A meeting was scheduled for January 11, 1995. (12a; 116a-117a)

In January, 1995, an Exxel employee sent anti-union statements signed by thirteen individual employees to NLRB Region 22, each stating that the undersigned employee did not want Union representation. (42a) The unit at this time consisted of twenty-three employees. (119a) Management was informed of these statements. (42a) By letter dated January 10, 1995, then counsel for Exxel notified NLRB Region 22 that Exxel had learned that a number of employees had approached Region 22 in an effort to decertify the Union, and consequently that the Company was postponing negotiations pending clarification of the matter. In that same letter, counsel asked the Region whether any decertification petition filed was signed by at least 50% of Exxel's 23 bargaining unit employees. (118a-119a) His request was repeated in a letter dated January 30, 1995, after the petition had been filed. He again specifically asked whether the petition had been signed by a "majority" of the company's then 23 bargaining unit employees. (125a-129a) The Region refused to provide this information. (130a-131a)

The purpose of this inquiry by Exxel's attorney was to follow the rule announced by the Third Circuit in *National Labor Relations*

Board v. New Associates, 35 F.3d 828, 835 (3d Cir. 1994), in which that court held that the filing of a decertification petition by employees in itself provides sufficient grounds for a good faith doubt of the union's majority status. Moreover, the Third Circuit held that if the Region will not advise the court and the employer of the number of employees that have signed the petition, "absent other evidence that the employer is aware of the insubstantiality of the decertification petition", petitions by the NLRB for the enforcement of a bargaining order would not be granted.

Counsel also notified the Union that the bargaining session that had been scheduled for January 11, 1995 would be suspended pending clarification of the situation. (116a-117a) On January 26, 1995, following the above mentioned correspondence with a Region 22 Board Agent, the employees filed a decertification petition. (122a-124a) Thereafter, on January 30, Exxel's counsel again wrote the Region advising of Exxel's good faith doubt as to the Union's majority status, and again asking whether the employees' petition for decertification was supported by a majority of the bargaining unit. Again, the NLRB refused to provide such information. (130a-131a)

On February 21, 1995, the Union filed the unfair labor practice charges which culminated in the NLRB's decision in *Exxel/Atmos, Inc.* (*Exxel II*), 323 NLRB No. 158 (1997), which was the subject of the petition for review and cross-petition for enforcement in No. 97-1417. To remedy the alleged unfair labor practices, the NLRB issued an affirmative bargaining order, which, as stated above, was the subject of the petition, and cross-petition in No. 97-1417, and which is now the subject of this petition for certiorari.

PRELIMINARY STATEMENT

This case involves a continuing effort by an employer and its employees to secure a secret ballot NLRB election, whereby those employees would determine whether they wish to be represented for purposes of collective bargaining by a labor organization — *a right that has been denied to them for eight years*. This case therefore concerns the core principles of the NLRA and the rights guaranteed to employees under § 7 of that Act.

Resolution of the questions presented by this petition will determine whether an election is finally conducted by the NLRB. These issues go far beyond the parameters of this particular case and significantly impact upon the uniform application of our national labor policy, as expressed by the NLRA and administered by the NLRB.

REASONS FOR GRANTING THE WRIT

I.

THE SPLIT OF AUTHORITY BETWEEN THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE THIRD CIRCUIT AS TO WHETHER TO OBTAIN ENFORCEMENT OF ITS ORDER THE NLRB MUST RESPOND TO THE REQUEST OF AN EMPLOYER FOR INFORMATION AS TO MAJORITY SUPPORT OF A PETITION FOR DECERTIFICATION REQUIRES RESOLUTION BY THIS COURT.

By virtue of the decision which is the subject of this petition, there now exists between the District of Columbia Circuit and the Third Circuit a direct conflict which goes to the very heart of the administration of the NLRA. That conflict impacts severely upon the right of employees to petition for the decertification of their collective bargaining representative and the right of an employer to withdraw recognition from what it believes to be a minority union. In its decision in this case, the court recognized that ". . . under some circumstances an employer may suspend bargaining if it can show by 'clear, cogent and convincing' evidence, either that the union has lost majority support or that the employer has a reasonable good faith doubt of continuing majority support." *Citing Micro-image Display Division of Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C.Cir. 1991). Nevertheless, the court, although citing the decision of the Third Circuit in *NLRB v. New Associates*, 35 F.3d 825 (3d Cir. 1994), failed to adopt and apply the sound principles expressed in that case.

In *New Associates*, the employer's employees filed a decertification petition with the NLRB, asserting by such petition that at least thirty percent of the employer's employees no longer

desired to be represented by their collective bargaining representative. *See National Labor Relations Act (NLRA)*, 29 U.S.C. § 159(c)(1)(A)(ii). The Union had, in fact, represented the Employer's employees over a period of several collective bargaining agreements.[3] The court found that although the NLRB had made an initial determination that the prescribed minimum number of employees (thirty percent) no longer supported the Union, it did not release the exact percentage of non-supporting employees to the employer. As a result, the employer did not know whether a majority of the employees sought decertification. Nevertheless, it withdrew from further collective bargaining based upon an assertion that the filing of the petition demonstrated a substantial showing of lack of support for the Union.

In *Telautograph Corp.*, 199 NLRB 892 (1972), the NLRB articulated the rule that in the absence of any evidence of employer misconduct, a decertification petition *required the employer* to refrain from further bargaining because the petition itself signified a general question as to the union's representative status. Ten years later, however, in *Dresser Industries, Inc.*, 264 NLRB 1088 (1982), the NLRB did an about-face, holding that *absent evidence that a majority of the employees supported the petition,* such a petition did not reflect the sentiment of the unit majority. *Dresser,* 264 NLRB at 1088. In so doing, however, the NLRB was careful to preserve the right of an employer to withdraw from bargaining whenever, based upon objective evidence, it had a good faith doubt as to the union's continued majority status. Thus, the NLRB stated:

> The rule we announce today in no way erodes the principle that an employer is privileged to withdraw from bargaining if, on the basis of objective evidence, it has a good faith doubt as to the union's continued majority status. *Thus, for example, if an employer is presented with a valid decertification petition, supported by a majority of the unit*

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3. Pursuant to § 102.18 of the NLRB's Statement of Procedure, a petition for decertification must be supported by at least thirty percent of the Employer's employees within the bargaining unit in order to warrant further investigation and processing.

> *employees, it may be privileged to withdraw from bargaining.* We will test an employer's good faith doubt as to continued majority status by our traditional criteria, regardless of the filing of a decertification petition. *Dresser, supra*, at 1089, n. 7. (Emphasis added.)

The District of Columbia Circuit approved of the NLRB's *Dresser rule in St. Agnes Medical Center v. NLRB*, 871 F.2d 137, 146 (D.C. Cir. 1989). In so doing, however, the court pointed out that even under *Dresser* an employer is precluded from asserting a good faith doubt only if its unfair labor practices "significantly contribute to such a loss of majority or to the factors upon which a doubt of such majority is based". That is not the case here. *NLRB v. New-Southern Dyeing & Finishing, Inc.*, 444 F.2d 11, 16 (4th Cir. 1970). *See, also, Hotel, Motel & Restaurant Employees v. NLRB*, 785 F.2d 796, 799 (9th Cir. 1996).

In *New Associates*, the Third Circuit (the circuit, incidentally, in which Exxel operates its plant), like the D.C. Circuit, was confronted with the issue of whether to accept the NLRB's rationale in *Dresser*. After noting that the circumstances in *Dresser* and *Telautograph* were essentially the same, the court nevertheless, in deference to the Board, found that *Dresser* is a rational interpretation of the Act "*. . . but only in those situations where the employer has requested from the NLRB information on the percentage of employees who support the decertification petition and the NLRB has informed the employer that the percentage is less than a majority*". *NLRB v. New Associates, supra*, at 835. (Emphasis added.)

In adopting that rule, the Third Circuit pointed out, in essence, that it is illogical for the NLRB to hold that an employer may withdraw from bargaining if it receives a decertification petition signed by a majority of its employees, while at the same time refusing to provide an employer with the very information upon which he could make that determination. Thus the court said:

> We conclude that it follows logically that notification to the Board by a majority of unit employees should also constitute objective evidence of a lack of union majority

> support to the employer in the event that the employer learns of the percentage of support for the petition. With knowledge of majority support for the petition, the employer is justified in ceasing to bargain with the union.

Certainly, the NLRB cannot assert that in denying such information it is in any way protecting the interests of the employees involved. The NLRB was not asked by counsel for Exxel to disclose the names of those who had supported the petition (thus providing information as to those who had not). He simply asked whether the petition was supported by a majority of employees within the bargaining unit. (130a-131a) The question required only a yes or no answer. Had the NLRB responded in accordance with the rule of the Third Circuit, Exxel's position would have been clear. If supported by a majority of its employees, it would have been clearly justified in withdrawing recognition. If the answer had been in the negative, it would have known that it withdrew recognition at its own risk. Left in the dark, it could only act upon the information it had received within the plant.

II.

THE THIRD CIRCUIT'S RULE IS SOUNDLY ROOTED IN COMMON SENSE, AND SHOULD HAVE BEEN FOLLOWED BY THE D.C. CIRCUIT.

The existing split of authority between the District of Columbia Circuit and the Third Circuit poses an important question regarding the administration of the NLRA and the right of employees to petition for decertification.

This case vividly demonstrates why resolution of the conflict between the circuits concerning the doctrine of *New Associates* requires resolution by this Court. The respondent, Steelworkers, was recognized as the collective bargaining representative of Exxel's production and maintenance employees on September 7, 1990. *Recognition was voluntarily extended without the benefit of an election.* Four days after recognition was tendered (September 11, 1990) a petition signed by eight of Exxel's then fourteen employees asserted that they did not want to be represented by the Steelworkers

or any other union. The employer sought to have the Union's majority status tested in an NLRB-conducted election, but its petition was dismissed pending resolution of unfair labor practice charges filed by the Steelworkers. (70a; 77a) Protracted litigation before the NLRB and the court of appeals has left the employees of Exxel, *eight years later,* without access to the NLRB's representation procedures. Similarly, this employer, under *Dresser supra*, must continue to recognize and bargain with the Union although it suspects, but has no way of knowing for certain, that a majority of its employees no longer wish to be represented by the Steelworkers.

In January, 1995, Exxel employees again expressed their anti-union sentiment by sending to the NLRB statements signed by a number of employees, stating that they did not want union representation. (42a) By letter dated January 10, 1995, then counsel for Exxel notified the NLRB's Region 22 that Exxel had learned that a number of employees had approached the Region in an effort to decertify the Union, and consequently that the Company was postponing negotiations pending clarification of the matter. (118a-119a) *In the same letter counsel asked the Region whether the decertification petition was signed by at least 50% of Exxel's employees.* On January 26, 1995, the initial action taken by the Company's employees was followed by the filing of a formal petition for decertification. (4a; 122a-124a) *On January 30, 1995 Exxel's counsel again wrote to the Region, asking whether the employer's petition for decertification was supported by a majority of the bargaining unit.* (13a; 125a-129a) The Region denied the Employer's request, refusing to advise it whether the petition for decertification was supported by a majority of its employees — information which would have justified, under *Dresser,* withdrawal of recognition from the Union. The petition for decertification has never been acted upon and the employees of Exxel remain without the benefit of an election and under union representation which a majority of them may not desire.

Failure of this Court to resolve the conflict surrounding *New Associates* would leave our national labor policy in the incongruous position where, under these circumstances, an employer whose appeal is considered by the Third Circuit could lawfully withdraw

recognition, whereas the same employer or any employer whose decision is tested in the District of Columbia Circuit by doing so would be found guilty of an unfair labor practice requiring the continuation of unwanted representation and the denial of access to the NLRB's representation procedures.

It has yet to be determined how other circuits will address this issue. Some may be guided by the decision of the Third Circuit in *New Associates,* while others might follow the approach of the District of Columbia Circuit in this case. Thus, without definitive teaching by this court, the split among the circuits might widen and, for all practical purposes, employers will be left without any clear lawful vehicle to determine whether recognition and bargaining should continue pending the processing of a petition for decertification.[4] As the Third Circuit stated in *New Associates*:

> . . . Disclosure to an employer of majority support for decertification, if such should be the situation, meets the long-recognized Board position that the loss of such majority support warrants the employer's withdrawal of recognition of the union as the bargaining representative and justifies the scheduling of an election. On the other hand, if a majority of the employees have not joined in a petition, bargaining will continue. 35 F.3d at 834-35.

The Third Circuit went on to note that because the Regional Director must determine whether the petition is supported by thirty percent of the employees in order to proceed with a hearing and election, it appears that without any additional administrative costs he could also calculate whether over fifty percent of the employees advocate decertification. Further, as noted earlier, the NLRB may adequately protect the interests of employees by refusing to disclose

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4. In its decision the circuit court of appeals correctly noted that "an affirmative bargaining order and an order requiring an employer to cease and desist from refusing to bargain do not have the same consequences. Under settled Board practice only the former carries with it a decertification bar preventing the employer from challenging the Union's majority status for a reasonable period of time. *See, e.g., Exxel/Atmos II*, 28 F.3d at 1248; *Caterair*, 22 F.3d at 1121-22 & 4." (34a-35a)

the names of those supporting the petition. It should be required only to disclose whether the petition is supported by over fifty percent of the employer's employees. That rule should be uniform throughout the United States.

III.

THE COURT OF APPEAL'S DECISION AS TO THE APPLICATION OF § 10(e) OF THE NLRA RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT.

The Court of Appeals enforced the affirmative bargaining order in *Exxel II* even though it denied enforcement of the NLRB's findings as to the speech given by the Employer and the bonus given to its employees — the essential roots relied upon by the NLRB to support its decision. Citing this court's decision in *Woelke & Romero Framing Company v. NLRB*, 456 U.S. 645, 666 (1982), the circuit court then declared that Exxel had waived its right to question the NLRB's order because it had not raised the issue by way of a motion for reconsideration or rehearing pursuant to Section 10(e).

Initially, it should be observed that it is not at all clear that the NLRB would have issued a bargaining order, had it not erroneously found that the Company had unlawfully "instigated" the decertification petition and acted unilaterally in the granting of a Christmas bonus. In fact, it is evident from the Board's decision that its second order *(in Exxel II)* is inextricably entwined with its first *(Exxel I)*. Thus the Board stated:

> "Finally, even had we not determined in the *underlying Exxel/Atmos* case that the respondent was precluded from withdrawing recognition as a result of the affirmative bargaining order, we would find that the respondent could not lawfully withdraw recognition based on the January, 1995 decertification petition. Thus, that the petition is tainted because it was unlawfully instigated by the respondent in violation of Section 8(a)(1) and was circulated in the context of the respondent's unilateral

grant of the '$100 Christmas bonus', which violated Sections 8(a)(5) and (1)." (46a) (Emphasis added.)

Clearly, there is and was in the mind of the NLRB an essential linkage between its first (unenforced) bargaining order and the erroneously perceived violations of the Act thereafter.

Secondly, *Woelke & Romero* is inapplicable here. In *Woelke & Romero*, the petitioner asked the Court of Appeals to find that unions do not violate § 8(b)(4)(A) when they picket to obtain a subcontracting clause sheltered by the construction industry proviso. However, that issue was never raised before the NLRB. The Court of Appeals and this Court rightly concluded that the failure to raise this *substantive* issue, either at the initial hearing or in a petition for reconsideration or rehearing, amounted to a waiver under § 10(e) of the Act.[5] The Court of Appeals in this case has raised *Woelke & Romero* to a new plateau requiring a motion for rehearing or reconsideration with regard to the nature of *the order* issued by the NLRB even though the respondent before the NLRB has fully litigated all of the issues upon which that order is based. Clearly, *Woelke & Romero* was never intended to require such an unnecessary and fruitless extension of litigation.[6]

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5. Section 10(e) of the Act provides that "no objection that has not been urged before the Board . . . shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances". 29 U.S.C.A. § 160(e).

6. While the court of appeal's decision has its genesis in *Woelke & Romero*, which was decided by this Court in 1982, it nevertheless refused to enforce the NLRB's affirmative bargaining order in *Exxel I* and remanded *Exxel I* to the NLRB for an explanation of why that extraordinary remedy was necessary, even though Exxel had never specifically asked the NLRB to reconsider that order by way of motion for reconsideration or rehearing, as the court now demands. In essence, the question is: Why was *Woelke & Romero* applied in *Exxel II*, when it was not applied in *Exxel I*? Given that fact, how could counsel for Exxel have known that a motion for rehearing or reconsideration would be required to preserve the issue on appeal? Obviously not, because *Exxel I* and *Exxel II* are inextricably entwined, and one cannot and should not have been considered without the other.

Further, *Woelke & Romero* is not absolute and does admit of exceptions. In *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963 (10th Cir. 1990), Facet had raised in the circuit a due process issue which it had not presented to the NLRB. Nevertheless, the court held:

> Failure to object to the Board's action does not preclude judicial review when a motion for reconsideration would be an empty formality, not serving the purposes of notice, efficiency or providing the Board with first opportunity to consider an issue. 907 F.2d at 971-2.

Similarly, in *Oil, Chemical & Atomic Workers International Union v. NLRB*, 842 F.2d 1142 (9th Cir. 1988), the Ninth Circuit rejected a *Woelke & Romero* argument with regard to the issue of retroactivity. The court stated:

> The NLRB contends that the Union is precluded from arguing against the retroactive application of *Indianapolis* since it did not raise the issue before the Board. . . . This argument has been squarely rejected by both the Seventh and D.C. Circuits. *NLRB v. Wayne Transp., a Div. of Wayne Corp.*, 776 F.2d 745, 749 (7th Cir. 1985); *Local 900, International Union of Elec. etc. v. NLRB (Gulton)*, 727 F.2d 1184, 1193 (D.C.Cir. 1984). . . . Retroactivity is necessarily an issue anytime a new rule of law is formulated. This fact, combined with the Board's extensive experience with retroactivity problems, should have alerted the Board to the Union's likely objection to the retroactive application of their new rules of law. We adopt these decisions as Ninth Circuit law.

Similarly, in this case, considering Exxel's objection to the bargaining order in *Exxel I* and the court's remand, there is no question the NLRB was on notice that a renewed affirmative order in *Exxel II* would be subject to the same attack. As a matter of fact, in the NLRB's brief it devoted an entire point to the issue of whether the NLRB's affirmative order should be enforced. (132a-136a) How then could the NLRB claim surprise when it was obviously aware that the Order would be in issue? In fact, it did not claim surprise. The issue was raised by the

Steelworkers and by the District of Columbia Circuit itself, overlooking the fact that the issue of the bargaining order was a continuation of the remand order which remained unanswered by the NLRB.[7]

Rule 10(c) provides that in ruling upon a petition for certiorari, the Court will give consideration to the fact that a state court or United States Court of Appeals has decided an important question of federal law that has not been but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. This case satisfies both prongs of that criteria. The court has never ruled on whether § 10(c) should be applied to orders issued by the NLRB. Furthermore, the court of appeals has unjustly extended this Court's decision in *Woelke & Romero* to require a petition for rehearing or reconsideration directed to an Order of the NLRB even though all issues upon which that order is based have been fully litigated; and in this case, even though the unfair labor practices upon which the NLRB relied in issuing its order have been found not to have been committed.

Clearly, this employer is being forced to bargain under an affirmative bargaining order which would preclude the filing of a petition for decertification because it failed, in the view of the court of appeals, to take an unnecessary *procedural* step required not by common sense, but simply by that court's misinterpretation of *Woelke & Romero*. The issue, therefore, is one that may arise frequently in the administration of the NLRA and should be settled by this court.

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7. The District of Columbia Circuit's reliance upon *Quazite v. NLRB*, 87 F.3d 493, 497-98 (D.C.Cir. 1996) is distinguishable. Since *Quazite* stood alone, there was no *Quazite I* and *Quazite II*, as there is an *Exxel I* and *Exxel II*. Nor was there a previous affirmative bargaining order under attack. Secondly, *Quazite* is simply not good law or a valid extension of *Woelke & Romero* insofar as it would require a petition for reconsideration of the Board's order when all issues upon which that order is based have been fully litigated by respondent. It unduly foments unnecessary litigation.

CONCLUSION

Based upon the foregoing and the record as a whole, the court is urged to grant the petitioner's petition for certiorari as to both questions presented.

Respectfully submitted,

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